

PUBLIC LAW BOARD NO. 7564

Case No. 6/Award No. 6
Carrier File No. 11-10-0382
Organization File No. S-P-1513-C

BNSF RAILWAY COMPANY)
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES DIVISION - IBT)

Statement of Claim:

The Carrier violated the Agreement when on April 12, 2010 Claimant Daniel L. Kerr was assessed a Level S 30-Day Record Suspension and a 1-year probation for violating MOWSR 12.7 Maintenance/Inspections.

As a consequence of the contractual violation noted above, the Carrier should expunge the discipline from the Claimant's personnel file.

Facts:

By letter dated February 10, 2010, the Claimant, a machine operator, was instructed to attend an investigation on February 19, 2010 "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to properly inspect and secure equipment before operating, resulting damage to Lowboy trailer, BNX-7200362, at 0630 hours, February 4, 2010, at approximately MP 1648, Wenatchee, Washington, on the Columbia River Subdivision, while working as a Group 2 Machine Operator on Gang TTDX-0434. . ." The investigation was actually held on March 16, 2010 after an agreed-upon postponement. On April 5, 2010 the above noted discipline was assessed against the Claimant.

Carrier's Position

The investigation was fair and impartial in accordance with Article 40, with the Organization not showing any prejudice to the Claimant. The discipline was properly assessed by other than the investigating officer. Missing exhibits had been read into the transcript. The Claimant failed to inspect and secure the equipment. And the Organization did not provide a persuasive affirmative defense.

Organization's Position

Rule 40 was violated because the Claimant did not receive a fair and impartial investigation. The investigation conductor had prejudged the Claimant. Exhibits provided by the Claimant were read into the transcript but then omitted from the file. The Carrier claimed to have considered the Claimant's past record, but the record was not entered as an exhibit during the investigation, constituted new evidence when provided later and the Organization's inspection of the document showed inaccuracies in that the Claimant had never worked in Texas, as the document indicated.

Simply because an accident occurred did not mean that the Claimant was at fault due to inattention or failure to inspect. The Claimant testified that he had inspected the outriggers and left them in the appropriate, raised position. This was an old lowboy that had not had the cylinders replaced and that, according to the repair facility, needed the cylinders replaced. Cylinders have been known to leak. The Carrier was seemingly uninterested in considering this mitigating evidence.

The Carrier has not provided substantial evidence of a rule violation, has classified the violation as serious but did not remove the Claimant from service, and assessed unfair and excessive discipline without consideration of the prior clean record.

Findings:

The Claimant received a fair and impartial hearing. The two exhibits provided by the Claimant should have been included in the file, but they had been read into the record and appeared in the transcript. For all practical purposes there was no difference in the information read into the record and the omitted statements and therefore there was no prejudice to the Claimant as a result of the omission.

The omission of the past record from the initial file and its later inclusion did not prejudice the Claimant despite the apparent inaccuracy of the Texas work location. That did not render the entire file inaccurate and the Organization had the opportunity to point out other inaccuracies, if they existed, but none were cited.

That the Lowboy trailer, BNX-7200362, was old and had not had cylinders replaced is insufficient to explain the incident. The Claimant, who was responsible for maintaining the Lowboy, had not heretofore reported or experienced problems with the equipment. Supervisor Fletcher's testimony that jack feet have leaked down 2-3 times in 2 ½ years constitutes a general statement but cannot be considered to apply to the Claimant's Lowboy since, presumably, had his equipment experienced leaks and problems with the control valve, the Claimant would have noticed the problem and would have contacted his supervisor to send the Lowboy for maintenance and repair. Whether it was the darkness and need to use a flashlight or something else that resulted in an inadequate inspection, the Board finds no reason to doubt the Carrier's conclusion based

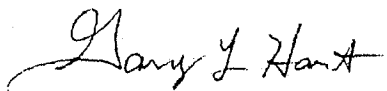
on the facts at hand that an appropriate inspection was not conducted and that this lack led to the accident and damage. The violation is deemed serious.

Award:

Claim denied.

Order:

The Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant not be made.



Gary Hart, Organization Member


Zahn Reuther, Carrier Member

I. B. Helburn, Neutral Member

Austin, Texas
November 1, 2012